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September 18, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 03-189

Dear Ms. Dortch:

Attached please find the Comments of the Save American Free Enterprise in Telecommunications (SAFE-T) Joint Commenters in the above-referenced proceeding, pursuant to the Commission's Public Notice (DA 03-2679, rel. August 18, 2003).

As the Public Notice recognizes, the instant Petition in this proceeding seeks identical relief to that sought by the Verizon Telephone Companies in WC Docket No. 03-157. Indeed, the instant Petition merely parrots the Verizon petition, to the extreme degree that nine of the thirteen footnotes in this 5-page petition are mere citations to the Verizon petition. In recognition of this fact, our Joint Comments in WC Docket No. 03-157, filed on August 18, 2003, addressed the instant petition. Accordingly, and as provided in the Public Notice, we hereby attach and incorporate by reference the Joint Comments of these parties in WC Docket 03-157.

Kindly address any correspondence concerning these Joint Comments to the undersigned counsel.

Very truly yours,

DAVIS WRIGHT TREMAINE LLP

/S/

James M. Smith

Enclosure

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
Verizon Telephone Companies	)	
	)	**WC Docket No. 03-157**
Petition for Forbearance From the	)	
Current Pricing Rules for the	)	
Unbundled Network Element Platform	)	

JOINT COMMENTS IN OPPOSITION TO PETITIONS FOR EXPEDITED FORBEARANCE

A+ American Discount Telecom, LLC
ACCtion Communications
AmeritelUSA, Inc.
Anew Telecommunications Corporation dba Call America
Bullseye Telecom, Inc.
Liberty Phones Inc.
NTS Communications
Phones For All, Inc.
Ren-Tel Communications, Inc.
SCTelcom
United Communications, Inc. d/b/a UNICOM
Utilities Commission of New Smyrna Beach, Florida
VarTec Telecom, Inc. and its subsidiary Excel Telecommunications, Inc.
Westel, Inc.

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August 18, 2003

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SUMMARY

At bottom, the Verizon petition (and the Qwest/BellSouth/SBC "me-too" submission) is nothing more or less than an audacious and cynical attempt to manipulate the Commission's orderly processes and to exhaust the resources of the CLEC community. To do so, the RBOC petitions must flagrantly ignore each and every one of the following:

1. The "forbearance" provision of Section 10 of the Act itself, which sets forth the criteria upon which the Commission may decide to forbear from applying a provision of the Act or its implementing regulations – *none* of which are satisfied here – and particularly the statutory limitation in Section 10(d), which explicitly *precludes* the forbearance sought here by the RBOCs;
2. Sections 251(c)(3) and 252(d)(1) of the Telecommunications Act of 1996, which authorize both the unbundled network element platform ("UNE-P") form of local competition and the TELRIC pricing methodology under attack in the RBOC petitions;
3. The Supreme Court's direct pronouncements on the provisions under challenge, in both its seminal 1999 decision in *Iowa Utilities Board* and its directly applicable holding scarcely a year ago in an appeal brought and lost by the leading petitioner here, *Verizon Communications Inc. v. FCC;*
4. The Commission's recent *Triennial Review Order,* which adopts decisions with respect to both UNE-P and TELRIC that would be rendered a nullity by a grant of the petitions, *and* its upcoming proceeding to review the

TELRIC methodology, which the RBOC petitions acknowledge will undertake the exact review that they apparently seek to circumvent here;

5. The recent decision of an Illinois federal district court, which rebuffed as illegal and "anti-competitive" SBC's latest attempt to repeal TELRIC;

6. The across-the-board downturn in the telecommunications economy over the past several years, which, astonishingly, the RBOC petitions blame to a significant degree on TELRIC and UNE-P; and

7. The tremendous weight of experience and evidence since the passage of the '96 Act, which show that UNE-P and TELRIC pricing have been the principal drivers of local exchange competition and consumer welfare in the wireline telecom sector.

The RBOC petitions' ability to ignore *all* of these factors is a remarkable feat of chutzpah. Even if their broad attack on the Commission's TELRIC pricing policy and the inclusion of exchange access in the UNE "platform" had any merit, these petitions would still be misplaced and premature. The petitions seek to hijack an incipient rulemaking proceeding, much as SBC recently attempted to hijack the Illinois Commerce Commission's UNE rate arbitration through the enactment of "sweetheart" legislation. The Commission should summarily dismiss the RBOC decisions, and leave the RBOCs and the CLECs to present their best evidence in the upcoming TELRIC review proceeding.

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
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JOINT COMMENTS IN OPPOSITION TO PETITIONS FOR EXPEDITED FORBEARANCE

A+ American Discount Telecom, LLC, ACCtion Communications, AmeritelUSA, Anew Telecommunications Corporation d/b/a Call America, Bullseye Telecom, Inc., Liberty Phones Inc., NTS Communications, Phones For All, Inc., Ren-Tel Communications, Inc., SCTelcom, United Communications, Inc. d/b/a UNICOM, the Utilities Commission of New Smyrna Beach, Florida, VarTec Telecom, Inc. and its subsidiary Excel Telecommunications, Inc., and Westel, Inc. (the "Joint Commenters"), by their attorneys, respectfully submit these Joint Comments in opposition to the Petition for Expedited Forbearance of the Verizon Telephone Companies, filed on July 1, 2003 in the above-captioned proceeding (the "Verizon petition"), as well as the Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications Inc. (collectively herein, "the RBOCs") for Expedited Forbearance, filed on July 31, 2003,

which seeks identical relief to that requested in the Verizon Petition.[1] Because the Qwest/BellSouth/SBC petition is nothing more than a five-page "me-too" endorsement of the Verizon petition and plea for the same relief, these Joint Comments will focus on the Verizon petition unless otherwise noted.

The Joint Commenters range from large nationwide integrated service providers to small, regional CLECs. All rely on the unbundled network element "platform" ("UNE-P") method of competitive local service provision, and all are members of the Save American Free Enterprise in Telecommunications Coalition ("SAFE-T"), which has been created to provide competitive local exchange carriers ("CLECs") with an economical and effective means to represent their interests in regulatory proceedings and before legislators where the continued availability of basic rights and access to critical resources in the possession of incumbent local exchange carriers ('ILECs") granted them under the Telecommunications Act of 1996 ("the 1996 Act") (47 U.S.C. §§ 151 et seq.) is in question.

I. INTRODUCTION AND SUMMARY

In their most basic terms, the Verizon and Qwest/BellSouth/SBC Petitions are nothing more than blatant and audacious attempts to relitigate already-decided issues resolved during the course of orderly but protracted proceedings conducted by the Commission in fulfilling its responsibilities under the 1996 Act to make available unbundled network elements at cost based rates. The CLEC community has already had to weather repeated delays in the availability of these basic capabilities and the

[1] Although the Commission has yet to docket the Qwest/BellSouth/SBC Petition, these comments respond to both of these petitions because of the identity of the issues and the relief being sought. In the event that the second petition is considered in a separate proceeding, these parties will file these same comments in that proceeding.

expenditure of substantial resources to litigate these issues before this Commission, the state commissions and in the courts. The CLECs' success in prevailing on this issue and obtaining rights that the plain language of the 1996 Act requires has not deterred Verizon and its fellow RBOCs, Qwest, BellSouth and SBC, from again doing everything in their power to frustrate local exchange competition. This is just one more attempt by these monopolists to deprive competing firms from the right to use unbundled network elements as one means of entering markets, leverage their control of essential facilities and exhaust the resources of the CLEC community by now creating a multi-front war to yet again relitigate an issue that has already been decided *and is even now* the subject of yet another pending proceeding, the Commission's Triennial Review.[2] In seeking this competition-thwarting relief, the RBOCs flagrantly ignore each and every one of the following statutory provisions, Supreme Court and lower court rulings, past and pending Commission decisions and proceedings, and industry developments:

1. The "forbearance" provisions contained in Section 10 of the 1996 Act (47 U.S.C. § 160), which set forth the criteria which the Commission must consider in deciding whether to forbear from applying a particular provision of the 1996 Act or its implementing regulations – *none* of which are satisfied here. Particularly egregious is the RBOCs' blatant disregard for the explicit statutory limitation of Section 10(d), which *precludes* the very forbearance sought here;

[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Report and Order*, FCC 03-36 (adopted Feb. 20, 2003) ("*Triennial Review Order*").

2. Sections 251(c)(3) and 252(d)(1) of the 1996 Act (47 U.S.C. §§ 251(c)(3), 252(d)(1)), which authorize both the unbundled network element platform ("UNE-P") form of local competition and the TELRIC pricing methodology under attack in the RBOC petitions;

3. The Supreme Court's direct pronouncements on the issue of access to and use of unbundled network elements, in both its seminal 1999 decision in *Iowa Utilities Board*[3] and its directly applicable holding scarcely a year ago in an appeal brought and lost by the leading petitioner here, *Verizon Communications Inc. v. FCC;*[4]

4. The Commission's recent *Triennial Review Order,*[5] which among other things adopted decisions on both the availability of UNE-P and the application of TELRIC that would be rendered a nullity by grant of these petitions, and its contemplated upcoming proceeding to review the TELRIC methodology, which the RBOC petitions acknowledge will undertake the exact review that they apparently seek to truncate here;

5. The June 9, 2003 decision of an Illinois federal district court, which rebuffed as illegal and "anti-competitive" the most recent attempt by one of these RBOCs to repeal TELRIC through the adoption of unlawful legislation;[6]

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[3] *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).
[4] *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).
[5] *Triennial Review Order, supra* note 2.
[6] *Voices for Choices v. Illinois Bell Telephone*, No. 03-C-3290 (N.D. Ill. June 9, 2003), slip op. at 17.

6. The across-the-board downturn in the telecommunications economy over the past several years, which, astonishingly, the RBOC petitions blame almost single-handedly on the adoption of TELRIC and the Commission's directive that UNE-P be made available to competing firms; and

7. The tremendous weight of experience and evidence since the passage of the 1996 Act and the outcome of the many proceedings in which the availability of UNE-P and TELRIC pricing have been challenged by these RBOCs, which shows that these pro-competitive policies of the Commission have offered the best hope for meaningful competitive choices for a vast majority of Americans and have underpinned the development of local exchange competition and the associated consumer welfare that such competition provides.

Pursuit of these petitions in direct contravention of *all* of this authority and precedent is a remarkable feat of chutzpah. But even if these monopolists' broad attack on the Commission's TELRIC pricing policy and its directive, in complete compliance with the requirements of the 1996 Act, that competing firms' use of unbundled network element ("UNE") functionalities entitle them to all of the same rights and responsibilities that they would enjoy if they were to deploy their own facilities[7] (use of UNEs is

[7] Section 251(c)(2) of the 1996 Act places no limits on how a telecommunications carrier must use unbundled network elements when it provides a telecommunications service. Indeed, it specifically *requires* incumbent local exchange carriers *to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."* Thus, a requesting

analogous to a lease of facilities or equipment in every other business context[8]) had any merit, these petitions and the relief requested would still be abusive and premature. Granting these petitions would effectively hijack an incipient FCC rulemaking proceeding, much in the same manner that SBC recently attempted the hijacking of a pending Illinois Commerce Commission UNE rate proceeding through the enactment of "sweetheart" legislation. The ink is not even dry on the Commission's Triennial Review Order, which makes some changes to TELRIC and presumably will include specific information on how the Commission will proceed with respect to revisiting the implementation of TELRIC. Other details that may have a bearing on the availability and pricing of UNE-P also will be set forth in that order. The Commission should summarily dismiss the RBOC petitions, and, if it thinks appropriate, direct that these issues be raised in the context of the upcoming TELRIC review proceeding.

II. THE "FORBEARANCE" STANDARD OF SECTION 10 OF THE ACT DOES NOT PERMIT THE RELIEF SOUGHT BY PETITIONERS

Section 10 of the Act authorizes the Commission to forbear from applying "any regulation or any provision of this Act" *if*: (1) its enforcement "is not necessary to ensure that the charges, practices, classifications or regulations [for the] telecommunications service are just and reasonable…; (2) enforcement … is not necessary for the protection of consumers; *and* (3) forbearance … is consistent with the public interest."[9] *Further*, in making this determination the Commission must weigh "whether forbearance … will

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carrier purchasing local switching and loops may combine them to provide any services it chooses.

[8] When a CLEC purchases UNE-P it commits to the use of such facilities to provide the services it wants to offer to customers along with the obligation to pay for such facilities. This is just like the situation where a copying service might lease rather than own copying equipment used in the provision of its copying services.

[9] 47 U.S.C. § 160(a) (emphasis supplied).

promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[10] Finally, and fatally for these petitioners, Section 10(d) contains a strict "Limitation" on this forbearance authority: Except with respect to certain rural telephone company provisions, "the Commission *may not* forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented."[11] The RBOC petitions completely ignore this critical limitation on forbearance, except for a passing (and nonsensical) conclusory statement contained in a footnote in the Verizon petition.[12]

A. Section 10(d) Prohibits the Forbearance Sought by Petitioners

Without even addressing the substantive considerations that must be weighed by the Commission in determining whether forbearance in a particular circumstance is warranted, the Commission should dismiss these petitions solely on the basis of the limitation imposed by Section 10(d). Congress explicitly singled out subsection (c) of Section 251 from even the possibility of forbearance. This is significant here because the Act's UNE provisions are contained therein. Further, it is paragraph (3) of subsection 251(c) that imposes a duty on ILECs to provide UNEs "in accordance with … the requirements of this section *and section 252*" *and* also requires that the ILEC "shall provide such unbundled network elements in a manner that allows requesting carriers to

[10] 47 U.S.C. § 160(b).
[11] 47 U.S.C. § 160(d) (emphasis supplied).
[12] *See* Verizon petition at n.38 (claiming that "once a carrier receives long distance authority in a given state, the Commission itself has concluded that those requirements have been fully implemented" – a highly dubious proposition with respect to Section 271, which in any event has nothing whatsoever to do with Section 251(c)).

combine such elements in order to provide such telecommunications service."[13] As the petitioners surely must comprehend, and as the Supreme Court has twice affirmed, Section 251 (c)(3) provides the statutory mandate for UNE-P,[14] and Section 252(d), unambiguously entitled "Pricing Standards," is the statutory basis of the TELRIC standard.[15] That provision establishes *separate* pricing standards for (1) interconnection and network elements charges, (2) charges for transport and termination of traffic and (3) wholesale prices for resold local telecommunications services. Note particularly that Section 252(d)(1)(A) specifically contemplates *separate standards and rates* for charges for unbundled network elements versus resale prices.[16] The petitioners' plea that a single pricing standard-- the one based on the costs avoided when a CLEC resells an ILEC's retail services-- should be applied to what is indisputably a combination of network elements which competing carriers are entitled to under Section 251(c), flies in the face of this specific and explicit statutory scheme. On this basis alone it should be rejected.

Moreover, as the Commission's 1996 *Local Competition Order*[17] made clear, both TELRIC and UNE-P are "requirements of section 251(c)" within the meaning of the restriction on forbearance of section 10(d). Verizon is correct, of course, in asserting that the Act itself did not *require* the adoption of the precise TELRIC methodology, nor did it explicitly state that CLECs, as purchasers of the UNEs that comprise exchange access, would thereby have the right to assess access charges. But, just as clearly, both of these

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[13] 47 U.S.C. § 251(c)(3) (emphasis supplied).
[14] *See Verizon Communications Inc. v. FCC,* 122 S. Ct. at 1684-87 (2002); *AT&T v. Iowa Utilities Board*, 525 U.S. at 394-95 (1999).
[15] *See* 47 U.S.C. § 252(d). *See also Verizon* at 1661-81 (2002).
[16] *Compare* 47 U.S.C. § 252(d)(1)(A) *with* 47 U.S.C. § 252(d)(3).
[17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

Commission policies directly implement Section 251(c) of the Act. The Commission adopted TELRIC as "a cost-based pricing methodology based on forward-looking costs, which we conclude is the approach for setting prices that best furthers the goals of the 1996 Act,"[18] and the Supreme Court last year in *Verizon* resoundingly validated that view:

> [The Act] is radically unlike all previous statutes in providing that rates be set "without reference to a rate-of-return or other rate-based proceeding" … in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.[19]

Similarly, in affirming that Section 251(c)(3) permits "all other requesting telecommunications carriers to purchase unbundled elements for the purpose of offering exchange access services," the Commission declared that

> we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. As we observed in the NPRM, section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a "telecommunications service," and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers "to combine such elements in order to provide such telecommunications service[s]." Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.[20]

Simply stated, and contrary to the RBOCs' view, exchange access is part and parcel of the telecommunications services provided by CLECs when they use combinations of UNEs as prescribed by Section 251 (c)(3), and "payment of cost-based rates represents full compensation to the incumbent LEC for the use of the network elements that carriers purchase…. Allowing incumbent LECs to recover access charges in addition to the

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[18] *Id.* at ¶ 620.
[19] *Verizon* at 1661 (citations omitted).
[20] *Local Competition Order* at ¶ 356 (footnote omitted).

reasonable cost of such facilities would constitute double recovery because the ability to provide access services is already included in the cost of the access facilities themselves."[21]

Thus, the Commission clearly and correctly viewed both of the policies that the RBOCs now advocate the Commission to forbear from enforcing as "applying the requirements of section 251(c)," and so they may not be subject to forbearance under the explicit limitation of section 10(d) "until [the Commission] determines that those requirements have been fully implemented."[22] The RBOCs' frivolous petitions for forbearance should and must be dismissed as Section 10(d) requires.

B. The Forbearance Criteria Contained in Section 10 Clearly Preclude the Forbearance Sought by Petitioners

In addition to the express prohibition of Section 10(d), the demanding standards for forbearance prescribed under Sections 10(a) and (b) clearly preclude the relief sought by the RBOC petitioners.

1. *Section 10(a)(1): "enforcement of such regulation … is not necessary to ensure that the charges, practices … are just and reasonable and are not unjustly or unreasonably discriminatory."*

The petitioners weakly assert that "the current pricing rules produce rates that are well below any rational measure of the costs of providing the UNE-P" – as always, with no hard evidence but only citations to friendly studies and analyst reports.[23] This is in direct contradiction to the *Local Competition Order,* where the Commission, based on record evidence, made clear that TELRIC "enables incumbent LECs to recover a fair

[21] Access Charge Reform, *First Report and Order*, 12 FCC Rcd 15982 at ¶ 337 (1997).
[22] 47 U.S.C. § 160(d).
[23] Verizon petition at 19.

return on their investment, *i.e.*, just and reasonable rates."[24] The Commission's determination was not without support. The Supreme Court in *Verizon* reviewed these same claims by the same petitioner and soundly rejected them,[25] and the Illinois district court in *Voices for Choices*, in enjoining the SBC-sponsored legislation that "effectively repealed" TELRIC, found that "there is no present basis to test SBC's thesis that it has been shortchanged lo these many years."[26]

Interestingly, the petitioners are not requesting that all application of TELRIC be suspended. Rather, they are attacking its application to the one use of UNEs that apparently represents the best hope that local exchange competition can materialize. These monopolists have trotted out this old routine time and time again in their attempts to handicap emerging competition. If the Commission were to grant petitioners' relief, absent TELRIC pricing for UNE-P, the petitioners could yet again thwart this nascent competition by manipulating their retail prices to eliminate competition. The unfavorable experience of a number of CLECs who tried competing for residential customers using the resale alternative pricing standard sought here makes it obvious why the RBOCs are seeking to replace TELRIC with it. As stated above, application of such a standard to UNE combinations that the 1996 Act expressly sanctions would contravene the explicit language of Section 252(d) of the Act. The petitioners' ultimate ability to control market entry and new entrant success would solidify their monopolies and would almost certainly lead to unjust, unreasonable and/or discriminatory rates.

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[24] Local Competition Order at ¶ 738.
[25] *See Verizon,* 122 S. Ct. at 1668-73.
[26] *Voices for Choices,* slip op. at 14, 21.

2. *Section 10(a)(2): "enforcement is not necessary for the protection of consumers."*

Consumers are benefiting today from the increasing choice of local exchange providers that the Commission's policies regarding UNE-P and TELRIC have produced. There are greater choices in terms of prices, terms and conditions. This is precisely what the 1996 Act sought. Granting the petitioners' requested relief would curtail those benefits to consumers by depriving them of these choices. As the *Voices for Choices* court flatly stated, the repeal of TELRIC sought recently by SBC "is anti-competitive. It will make it harder for competitors to compete with SBC. Less competition means less choices for consumers, and less choices for consumers ultimately leads to higher prices."[27] And as the Supreme Court affirmed in upholding TELRIC over Verizon's "actual costs" alternatives, "the upshot would be higher retail prices consumers would have to pay."[28]

3. *Section 10(a)(3): "forbearance … is consistent with the public interest."*

For all of the reasons discussed above, there would be no basis for the Commission to now reverse long-standing policies on the basis of the bald assertions presented in the RBOCs' petitions. Not only would such action be inconsistent with explicit requirements of the 1996 Act as to the pricing of UNE combinations, but it would also limit the manner in which CLECs could use combinations of UNEs contrary to other explicit terms of the 1996 Act. The 1996 Act was passed to foster the development of local exchange competition. The actions requested would be diametrically opposed to accomplishing that purpose. Doing so would not be in the public interest.

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[27] *Id.* at 17.
[28] *Verizon*, 122 S. Ct. at 1673.

Once again, the Commission in establishing the policies at issue here is not without support. As the Supreme Court admonished Verizon in upholding UNE-P: "This duty is consistent with the Act's goals of competition and nondiscrimination, and imposing it is a sensible way to reach the result the statute requires."[29] While the RBOCs may perceive these policies as not in their own corporate interests by depriving them of the opportunity of maximizing profits, their individual interests in this case are not aligned with those of the public interest as evaluated by this Commission, the courts and the state commissions in striving to uphold and enforce the requirements of the 1996 Act.

4. ***Section 10(b): "COMPETITIVE EFFECT TO BE WEIGHED: --- The Commission shall consider whether forbearance … will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."***

The monopolists strain credulity in contending that forbearance that will ensure higher prices and devastate competitors will enhance competition. This claim has been trotted out by them before when they charged that UNE-P was "sham unbundling." Ultimately, after lengthy and costly litigation to confirm CLECs' rights to the use of UNE-P, competition for monopoly local exchange services that these petitioners provide has begun to emerge. These petitioners would now quash it with the relief they are requesting. Instead of having to share access to critical resources and capabilities constructed under monopoly protection with nascent competition at economically rational rates consistent with pricing one would find in a truly competitive market, as the 1996 Act contemplates, petitioners seek to regain control of competitors' access to critical facilities and be in a position to dictate the prices that those competitors pay so they can

[29] *Id.* at 1687.

maintain rate relationships between competitive offers and retail offerings that they choose, rather than what the market dictates. This is nothing more than monopoly leveraging.

The Commission and the Supreme Court have acknowledged these basic tenets. Thus, the Commission found when adopting TELRIC that "a forward-looking cost methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior."[30] Similarly, the Supreme Court stated in upholding UNE-P: "The Act … proceeds on the understanding that incumbent monopolists and contending competitors are unequal," and UNE-P is "meant to remove practical barriers to competitive entry into local-exchange markets while avoiding serious interference with incumbent network operations."[31]

In sum, the RBOCs cannot and have not made a case that they have satisfied the rigorous showing required to warrant the extraordinary measure of Commission forbearance from enforcement of the pro-competitive rules and policies that the petitioners seek to eradicate.

III. THE RBOCS' VARIOUS ALLEGATIONS OF "HARM" ARE UNPERSUASIVE AND UNAVAILING

Beyond the obvious insufficiency of these petitions when scrutinized against the limitation and forbearance standards in Section 10, they do little more than to trot out once more the litany of shopworn arguments and self-serving "studies" that have been exposed again and again by the Commission, state commissions and the courts as simply rhetoric fashioned to drape themselves in a public policy mantel while actually seeking to

[30] *Local Competition Order* at ¶ 679.
[31] *Verizon*, 122 S. Ct. at 1684, 1685.

perpetuate their monopolies. In these petitions, they persist in claiming that these carefully reasoned Commission policies, both of which have been scrutinized and affirmed by the courts, have grievously harmed them, local competition generally, and facilities-based competition particularly. Once again, they paint UNE-P as nothing more than disguised resale and "massive regulatory arbitrage;" and that the TELRIC pricing rules have "contributed materially" to a $2 *trillion* decline in the market capitalization in the telecom sector and to a "massive decline in telecommunications investment."[32] In support, Verizon produces an unattributed in-house report on "The Negative Effect of Applying TELRIC Pricing to the UNE Platform in Facilities-Based Competition and Investment."[33]

Assuming *arguendo* that these familiar claims have any shred of factual basis, they might have a place in the Commission's planned TELRIC review; but, as demonstrated above, these bald assertions and the clearly illegal relief the petitions request can neither satisfy the criteria of the Section 10 forbearance provision nor explicit requirements of the 1996 Act. In any event, as the Commission has seen in numerous recent proceedings, economists, analysts and other commentators on these matters come to starkly differing conclusions. Without reverting to a wasteful repetition of the persuasive evidence that belies the RBOCs' claims, it is simply worth noting that many prominent experts have concluded that the rise in competitive entry is directly traceable to the availability of UNE-P as well as all UNEs at TELRIC prices. Those experts have concluded that the rise to prominence of UNE-P at TELRIC pricing as a vehicle for competitive local entry has resulted in tremendous increases in investment on the part of

[32] *See, e.g.*, Verizon petition at 5, 7, 18, 23.
[33] *Id.* at Attachment B.

CLECs and ILECs alike. These experts have also found that ILECs enjoy significant profit when providing UNE-P and other UNEs at TELRIC prices; and that the availability of UNE-P has tremendously increased and enhanced local exchange competition, to the benefit of both residential and business customers.[34] The Commission has documented, and the Verizon petition acknowledges, this tremendous growth in local competition.[35]

On the basis of these very real numbers—rather than the anecdotal claims of the RBOCs that never seem to be backed up by hard data—the Supreme Court found only a year ago that "at the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it simulates but does not produce facilities-based competition founders on fact."[36]

IV. CONCLUSION

Recognizing the pendency of the Commission's upcoming generic review of the TELRIC methodology, the NARUC recently adopted a resolution opposing the Verizon petition and affirming that "national forbearance is premature."[37] In the same vein, the Supreme Court last May in *Verizon* concluded: "We cannot say whether the passage of time will show competition prompted by TELRIC to be an illusion, but TELRIC appears

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[34] *See, e.g.,* Yale M. Braunstein, "*The Role of UNE-P in Vertically Integrated Telephone Networks: Ensuring Healthy and Competitive Local, Long-Distance and DSL Markets"* (May 2003), *available at* *h*ttp://www.sims.berkeley.edu/%7Ebigyale/UNE/UCB_Study_UNE_May_2003.pdf; The Phoenix Center, Policy Bulletin No. 5: Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P (July 9, 2003) and Policy Bulletin No. 4: The Truth About Telecommunications Investment (June 24, 2003), *available at* www.phoenix-center.org/PolicyBulletin*;* Bruce Fein, "Telecommunications Investment Bonanza," July 11, 2003, *available at* www.techcentralstation.com/1051/techwrapper.jsp?PID=1051-250&CID=1051-071103D.

[35] *See* Verizon petition at Attachment B, p. 13, *citing* FCC Industry Analysis Div., *Local Telephone Competition: Status as of December 31, 2002* (June 2003).

[36] *Verizon* at 1675.

[37] NARUC Resolution, adopted July 30, 2003.

to be a reasonable policy for now, and that is all that counts."[38] The RBOC petitions are without merit and indeed are an affront to the Commission's well-reasoned and statutorily-based policies and processes, and they should be summarily dismissed.

Respectfully submitted,

A+ American Discount Telecom, LLC
ACCtion Communications
AmeritelUSA, Inc.
Anew Telecommunications Corporation dba Call America
Bullseye Telecom, Inc.
Liberty Phones Inc.
NTS Communications
Phones For All, Inc.
Ren-Tel Communications, Inc.
SCTelcom
United Communications, Inc. d/b/a UNICOM
Utilities Commission of New Smyrna Beach, Florida
VarTec Telecom, Inc. and its subsidiary Excel Telecommunications, Inc.
Westel, Inc.

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August 18, 2003

[38] *Verizon* at 1678.